

Form #4

OFFICE OF THE SECRETARY OF STATE

Virgil T. Helton
Secretary of Revenue

TITLE 110
LEGISLATIVE RULE
STATE TAX DEPARTMENT

SERIES 13X
WEST VIRGINIA FILM INDUSTRY INVESTMENT ACT

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WEST VIRGINIA
SECRETARY OF STATE

§110-13X-1. General.

1.1. Scope. -- This Legislative Rule is promulgated to provide for the general administration of the West Virginia Film Industry Investment Act, W. Va. Code §§ 11-13X-1, *et seq.* This Rule carries out the policy and purposes of the Statute, provides necessary clarification of the provisions of the Statute, and provides for the general administration of the Statute.

1.2. Authority. -- W. Va. Code §§ 11-13X-9, 11-10-5 and 11-10-5d(f).

1.3. Filing Date. -- _____.

1.4. Effective Date. -- _____.

1.5. Citation. -- This Legislative Rule may be cited as §110CSR13X.

§110-13X-2. Definitions.

2.1. "Commercial exploitation" means reasonable intent for public viewing for the delivery medium used.

2.2. "Controlled group" means one or more chains of corporations connected through stock ownership with a common parent corporation, if stock possessing at least fifty percent of the voting power of all classes of stock of each of the corporations is owned directly or indirectly by one or more of the corporations; and the common parent owns directly stock possessing at least fifty percent of the voting power of all classes of stock at least on of the other corporations.

2.3. "Direct production expenditure" means a transaction that occurs in the state of West Virginia or with a West Virginia vendor, and includes:

2.3.a. Payment of wages, fees ~~fringe benefits or~~ and costs for related fringe benefits provided for talent, management or labor to a person who is a resident of that are subject to West Virginia income tax;

2.3.b. Payment to a personal services corporation for the services of a performing artist if:

2.3.b.1. The personal services corporation is subject to West Virginia income tax on those payments; and

2.3.b.2. The performing artist receiving the payments from the personal services corporation is subject to West Virginia income tax; and

2.3.c. Any of the following provided by a vendor:

2.3.c.1. The story and scenario (script) to be used by a qualified project;

2.3.c.2. Set construction and operations, wardrobe, accessories and related services;

2.3.c.3. Photography, sound synchronization, lighting and related services;

2.3.c.4. Editing and related services;

2.3.c.5. Rental of facilities and equipment;

2.3.c.6. Leasing of vehicles;

2.3.c.7. Food or lodging;

2.3.c.8. Airfare if purchased through a West Virginia-based travel agency or travel company;

2.3.c.9. Insurance coverage and bonding if purchased through a West Virginia-based insurance agent; and

2.3.c.10. Other direct costs of producing a qualified project in accordance with generally accepted entertainment industry practices.

2.4. "Eligible company" means a person or business entity engaged in the business of producing film industry productions.

2.5. "Feature length" means in excess of forty minutes.

~~2.6. "Federal new markets tax credit program" means the tax credit program codified as Section 45D of the United States Internal revenue code of 1986, as amended."~~

~~2.7.~~ 2.6. "Film industry production" means a qualified project intended for reasonable national or international commercial exploitation."

~~2.8.~~ 2.7. "Film Office" means the West Virginia Film Office, which is a section of the West Virginia Division of Tourism, which, in turn, is a division of the West Virginia Department of Commerce.

~~2.9.~~ 2.8. "Investor" means and includes any person or entity seeking to establish entitlement to the tax credit addressed in this rule, or any person or entity making expenditures, investments or purchases for which the purchaser, investor or taxpayer purports to directly or indirectly establish entitlement to the tax credit established in this rule.

~~2.10.~~ 2.9. "Loan-out corporation" means a company owned by one or more artists that provide the services of a performing artist to a payroll service company or a third-party

production company, i.e., an eligible company for purposes of W. Va. Code §11-13X-1, *et seq.*

~~2-11.~~ 2.10. "Payroll service company" means a business engaged in outsourcing solutions for human resources, payroll, tax and benefits administration.

~~2-12.~~ 2.11. "Performing artist" means a person hired to perform services associated with the artist's particular craft in any department associated with a qualified project.

~~2-13.~~ 2.12. "Personal services corporation" means a company that performs services in the field of performing arts, among other fields, and meets ownership and service tests as determined by the Internal Revenue Service.

~~2-14.~~ 2.13. "Post-production expenditure" means a transaction that occurs in West Virginia or with a West Virginia vendor after the completion of principal photography, including editing and negative cutting, Foley recording and sound effects, automatic dialogue replacement (also known as ADR or dubbing), special effects or visual effects, including computer-generated imagery or other effects, scoring and music editing, sound editing, beginning and end credits, soundtrack production, subtitling or addition of sound or visual effects; but not including expenditure for advertising, marketing, distribution or expense payments.

~~2-15.~~ 2.14. "Purchaser" means and includes any person or entity seeking to establish entitlement to the tax credit addressed in this rule, or any person or entity making expenditures, investments or purchases for which the purchaser, investor or taxpayer purports to directly or indirectly establish entitlement to the tax credit established in this rule.

~~2-16.~~ 2.15. "Qualified project" means a feature length theatrical or direct-to-video motion picture, a made-for-television motion picture, a commercial, a music video, commercial still photography, a television pilot program, a television series and a television mini-series that incurs a minimum of \$25,000 in direct production expenditures and post-production expenditures, as defined by this subsection, in West Virginia. The term excludes news or current affairs programming, a weather or market program, an interview or talk show, a sporting event or show, an awards show, a gala, a production that solicits funds, a home shopping program, a program that primarily markets a product or service, political advertising or a concert production.

~~2-16.a.~~ 2.15.a. A qualified project may be produced on any single media or multimedia program that:

~~2-16.a.1.~~ 2.15.a.1. Is fixed on film, digital medium, videotape, computer disk, laser disc or other similar delivery medium;

~~2-16.a.2.~~ 2.15.a.2. Can be viewed or reproduced;

~~2-16.a.3.~~ 2.15.a.3. Is not intended to and does not violate a provision of W. Va. Code §§61-8C-1, *et seq.*;

~~2-16.a.4.~~ 2.15.a.4. Does not contain obscene matter or sexually explicit conduct, as defined by W. Va. Code §§61-8A-1, *et seq.*;

~~2.16.a.5.~~ 2.15.a.5. Is intended for reasonable commercial exploitation for the delivery medium used; and

~~2.16.a.6.~~ 2.15.a.6. Does not contain content that portrays the State of West Virginia in a significantly derogatory manner.

~~2.17.~~ 2.16. "Related person" means a corporation, partnership, association or trust controlled by the taxpayer; or an individual, corporation, partnership, association or trust that is in control of the taxpayer.

~~2.18.~~ 2.17. "Reviewing committee" means a committee consisting of the following persons:

~~2.18.a.~~ 2.17.a. The Secretary of the West Virginia Department of Commerce, or his or her designee,

~~2.18.b.~~ 2.17.b. The Secretary of the West Virginia Department of Education and the Arts, or his or her designee,

~~2.18.c.~~ 2.17.c. The Director of the West Virginia Film Office, or his or her designee,

~~2.18.d.~~ 2.17.d. The Commissioner of the West Virginia Division of Tourism, or his or her designee,

~~2.18.e.~~ 2.17.e. The Tax Commissioner, or his or her designee and

~~2.18.f.~~ 2.17.f. An additional representative of the West Virginia Film Office to be appointed by the Commissioner of Tourism.

~~2.19.~~ 2.18. "Tax Commissioner" means the West Virginia State Tax Commissioner or his or her designee.

~~2.20.~~ 2.19. "Taxpayer" means and includes any person or entity seeking to establish entitlement to the tax credit addressed in this rule, or any person or entity making expenditures, investments or purchases for which the purchaser, investor or taxpayer purports to directly or indirectly establish entitlement to the tax credit established in this rule.

2.20. "Television series" means a group of programs created or adapted for television broadcast with a common series title, usually related to one another in subject.

§110-13X-3. Amount of Tax Credit.

3.1. Tax credit allowed. – The amount of tax credit allowed to an eligible company, except as provided in subsection 3.2 of this section, shall be is twenty-seven percent.

~~3.1.a. A base amount of twenty-two percent.~~

~~3.1.a.1. For taxable years beginning prior to January 1, 2010, there is an additional credit of five percent.~~

~~3.1.b.~~ 3.2. Extra allowance for hiring of local workers. – The base allowance shall be increased by:

~~3.1.b.1.~~ 3.2.a. An additional four percent if the eligible company, or its authorized payroll service company, employs ten or more West Virginia residents during principal production as part of its full-time employees working in the state or as apprentices working in the state. The Film Office shall determine the number of full time employees based on employment levels during principal production, rather than pre-production or post-production levels. Since talent and crew work under different circumstances and work hours vary, industry standards ~~will~~ shall be taken into consideration when evaluating full-time employees; and

~~3.1.b.2.~~ 3.2.b. If the jobs threshold required by W. Va. Code §§11-13X-5(b) is met for purposes of entitlement to the four percent extra allowance, then the additional tax credit applies to all expenditures attributable to the qualified project for which the eligible company receives a tax credit pursuant to W. Va. Code §§11-13X-1, *et seq.* It is not limited to costs incurred only during principal production.

§110-13X-4. Requirements for Tax Credit; Application for Tax Credit.

4.1. In order for any company to take a credit under W. Va. Code §§11-13X-1, *et seq.*, it shall comply with the following requirements:

4.1.a. Each qualified project must incur a minimum of \$25,000 in expenditures in West Virginia or with a West Virginia vendor.

4.1.b. If the qualified project contains production credits, the eligible company shall agree, upon request by the Film Office, to recognize the State of West Virginia with the following acknowledgement in the end credit roll: "Filmed in West Virginia with assistance of the West Virginia Film Industry Investment Act";

4.1.c. Apply to the Film Office on forms and in the manner the Film Office may prescribe.

4.1.c.1. A company shall submit to the Film Office one (1) completed West Virginia Film Industry Investment Act eligibility application, with original signatures and attachments. The eligible company should submit an eligibility application as far in advance as possible prior to the first expenditure in West Virginia. However, an eligible company may submit an application at any time during production or after production: *Provided*, That the applicant runs the risk of there being no tax credits remaining under the statutory maximum. The reviewing committee may deny the application if it does not meet all eligibility requirements. Qualified costs incurred prior to the approval of an application are eligible for the incentive if there are tax credits remaining within the \$10 million cap at the time of approval.

4.1.c.2. The application shall include, but not be limited to:

4.1.c.2.A. A completed West Virginia Film Industry Investment Act eligibility application;

4.1.c.2.B. A copy of the script, or, for commercials, music videos or commercial

still photography, a copy of the storyboards or shot lists;

4.1.c.2.C. Proof or status of financing or distribution arrangements;

4.1.c.2.D. A copy of the budget top sheet, which contains a dedicated column that identifies estimated direct production expenditures and post-production expenditures that will be incurred in West Virginia;

4.1.c.2.E. A signature and verification by the applicant or by a duly authorized representative of the applicant;

4.1.c.2.F. The full legal name and tax identification number of the applicant;

4.1.c.2.G. The applicant's physical address, mailing address and telephone number; and

4.1.c.2.H. A certified copy of the applicant's certificate of incorporation, articles of organization, or other similar documents that verify the applicant is in good standing and registered to do business in the state of West Virginia.

4.1.c.3. Application forms may be obtained from the West Virginia Film Office.

4.1.d. Upon approval of an eligibility application, the eligible company shall begin production within one hundred twenty (120) days of approval, or shall otherwise forfeit the right to claim any tax credit for the approved qualified project. The forfeiture does not preclude the eligible company from resubmitting an eligibility application for the same project at a future date. Upon written request by the eligible company, and prior to the expiration of the one hundred twenty (120) day deadline, the reviewing committee may extend the deadline at its discretion.

4.2. The applicant shall submit to the Film Office information required by the Film Office to demonstrate conformity with the requirements of this section and shall agree in writing:

4.2.a. To pay all obligations the eligible company has incurred or will in future incur in West Virginia;

~~4.2.b. To publish, at completion of principal photography, a notice at least once a week for three consecutive weeks in local newspapers in regions where filming or production has taken place to notify the public of the need to file creditor claims against the eligible company by a specified date;~~

~~4.2.c. That outstanding obligations are not waived should the creditor fail to file by the specified date; and~~

4.2.d. ~~4.2.b.~~ To delay filing a claim for the tax credit authorized by W. Va. Code §§11-13X-1, *et seq.* until the Film Office delivers written notification to the Tax Commissioner that the eligible company has fulfilled all requirements for the credit.

~~4.2.e. 4.2.c.~~ Each allocation year stands on its own. It is necessary for an eligible company to file a new application for each year in order to be considered for credit allocation

in each specific year. Projects are approved on a first come, first served basis. The maximum amount of project tax credit for any taxable year is the amount allocated by the Film Office through the project review and certification process.

4.2.d. Any television series that has been approved and issued an approval letter, shall be placed at the top of the queue for an open allocation period on each subsequent year in the life of that series whenever credits are assigned within a fiscal year. Queue placement in subsequent years will be based on the year of original application and original queue number assigned for that series. Each television series must submit a new application for each season prior to any open application period.

4.3. Upon completion of a qualified project:

4.3.a. ~~File~~ An eligible company shall have filed all required West Virginia tax reports and returns ~~for all applicable tax years and pay and paid any balance of West Virginia tax due on those returns;~~

4.3.b. ~~File~~ All claims for the tax credit shall be filed with an expense verification report prepared by an independent certified public accountant licensed to practice in the United States, using "Agreed Upon Procedures" which are prescribed by the Film Office in accordance with generally accepted auditing standards in the United States. The certified public accountant ~~will~~ shall render a report as to the qualification of the credits, consistent with guidelines to be determined by the Film Office and approved by the Tax Commissioner; and

4.3.c. ~~Submit~~ An eligible company claiming an extra allowance for employing local workers shall submit to the Film Office documentation verifying West Virginia residency for all individuals claimed to qualify for the extra allowance. The documentation shall include the name, home address and telephone number for all individuals used to qualify for the extra allowance.

4.4. Disqualification. The Film Office may disqualify in whole or in part any investment or expenditure from eligibility for the tax credit if it appears that the economic substance of an expenditure is not for services substantially rendered in West Virginia, or is for the purchase or lease of tangible personal property not used or operated in West Virginia or is for purchases or leases of realty not located in West Virginia.

4.4.a. The Film Office may disqualify in whole or in part any investment or expenditure from eligibility for the tax credit if it appears that the economic substance of an expenditure or transaction constitutes self dealing or an expenditure or investment primarily directed to or received by the purchaser or investor, or by an alter ego of the purchaser or investor or by a related person related to the purchaser or investor or by a member of the same controlled group as the controlled group to which the purchaser or investor belongs.

4.4.b. For purposes of this rule, an entity or person is presumed to be an alter ego, nominee or instrumentality of another person, entity or business if:

4.4.b.1. More than twenty percent of the real assets or more than twenty percent of the operating assets or more than twenty percent of the tangible personal property of one person, entity or business are or have been transferred to the other person, entity or

business, or are or have been used in the operations of the other person, entity or business, or more than twenty percent of the real assets or more than twenty percent of the operating assets or more than twenty percent of the tangible personal property of one business are or have been used to collateralize or secure debts or obligations of the other person, entity or business;

4.4.b.2. Ownership of the persons, entities or businesses is so configured that the attribution rules of either Internal Revenue Code section 267 or Internal Revenue Code section 318 would apply to cause ownership of the persons, entities or businesses to be attributed to the same person, entity or business; or

4.4.b.3. Substantive control of the persons, entities or businesses is held or retained by the same person, entity or business, directly or indirectly, or through attribution under paragraph 4.4.b.2 of this rule.

4.5. If the requirements of this section have been complied with as determined by the Film Office, the Film Office shall approve the tax credit and issue a document granting the appropriate tax credit to the eligible company and shall report this information to the Tax Commissioner.

§110-13X-5. Application Receipt and Review.

5.1. The Film Office shall determine and report to the Tax Commissioner in a manner and at times the Film Office and the Tax Commissioner agree upon:

5.1.a. The eligibility of the company and a proposed project; and

5.1.b. The maximum amount of the tax credit available to the eligible company based on estimated "direct production expenditures" and "post-production expenditures."

5.2. The Film Office shall reserve tax credits for an eligible company by:

5.2.a. Reserving the credits to eligible companies in the order in which eligibility applications are received and approved by the Film Office;

5.2.b. Ensuring that the amount of reserved and allocated credits for the given year does not exceed the maximum available credit as limited by W. Va. Code §§11-13X-1, *et seq.*;

5.2.c. Notifying the eligible company, in writing, of the amount of credits that have been reserved for the eligible company and providing copies of the notification to the Tax Commissioner. Timely notice shall be provided to production companies for television series to ensure future series will qualify.

5.3. The Film Office shall receive eligibility applications on a first-come, first served basis during regular business hours. The Film Office shall record the time and date of receipt of an eligibility application.

5.4. The Film Office shall review all eligibility applications in the order of their receipt to determine if each application is complete. When it is determined that an eligibility application

is complete, the reviewing committee shall review the applications in the order of their receipt to determine if the applicant and the proposed project meet the eligibility requirements to apply for the tax credit. The reviewing committee's determination shall be made within thirty (30) days receipt of the eligibility application. The eligibility application shall be considered received, for purposes of the time requirements set forth in this rule, and for purposes of assigning a queue position to the application for review by the reviewing committee, when the application is physically received by the Film Office.

5.5. In the event the Film Office determines an eligibility application to be incomplete, the Film Office shall notify the applicant, in writing, of the reasons for that determination and shall return the incomplete application to the applicant. The applicant may resubmit the eligibility application after correcting the deficiencies stated in the notice, but the resubmitted eligibility application must be received by the Film Office within twenty (20) days after the Film Office sends the notice, in order for the application to maintain its initial position in the queue. Any resubmitted application that is received by the Film Office more than twenty (20) days after the Film Office sends the notice may, within the sole discretion of the Film Office, be denied further consideration or may be added to the queue based on the actual date of physical receipt of the resubmitted application by the Film Office.

5.6. Requests for Increase in Tax Credit Allocation. - If an eligible company seeks an increase in the amount of tax credits for an approved qualified project, the eligible company shall submit an application for modification to the Film Office, which shall be submitted by and bear the same signature as the person who submitted the original eligibility application, or a duly authorized representative. The reviewing committee shall place requests for an increase in the order of receipt of all applications, assign each request a new application number and review each request separately from the original eligibility application. The reviewing committee shall consider the application at its next scheduled meeting, but within thirty (30) days of receipt, and may request additional information from the applicant to assist in its evaluation of the request. The reviewing committee shall determine approval using the same criteria of the review process and based on the availability of any remaining credits for the fiscal year in which the request is received. The Film Office shall notify the eligible company in writing of the reviewing committee's decision.

5.7. Other Revisions to Application. - If an eligible company seeks to revise its original eligibility application for a qualified project for reasons other than those identified in subsection 5.6 of this rule, the eligible company shall submit an application for modification to the Film Office, which shall be submitted by and bear the same signature as the person who submitted the original eligibility application, or a duly authorized representative. The reviewing committee shall consider the application at its next scheduled meeting, but within thirty (30) days of receipt, and may request additional information from the applicant to assist in its evaluation of the request. The reviewing committee shall determine the approval using the same criteria of the review process. The Film Office shall notify the eligible company in writing of the reviewing committee's decision.

5.8. False Information. - Upon the submittal of any false or misleading information by an applicant, the Film Office may reject the application and deny further consideration of the applicant for qualification in current and subsequent fiscal years.

5.9. Complete Application. - Upon a determination by the Film Office that an eligibility application is complete, the Film Office shall place the complete application on the agenda of

the next duly or regularly scheduled meeting of the reviewing committee. Complete applications shall be placed on the agenda in the order of their receipt by the Film Office.

5.10. Action of Reviewing Committee. – The allocation of all tax credits under this Rule must be approved by the reviewing committee. The reviewing committee shall consider all completed applications in the order they are placed on the agenda. Once an applicant and a project described in an eligibility application have been determined by the reviewing committee to meet the eligibility requirements of W. Va. Code §11-13X-6 and this rule, the Film Office shall notify the Tax Commissioner in writing of the eligibility of the company and the project and the maximum amount of the tax credit to be reserved for the eligible company.

§110-13X-6. Forfeiture of credit.

6.1. If an eligible company fails to begin production within the time specified in subdivision 4.1.d. of this rule, the eligible company forfeits the right to claim any tax credit for the approved qualified project and the Film Office shall release the reserved credit and cause it to be available for the next eligible qualified project in the queue for approval. The forfeiture does not preclude the eligible company from resubmitting an application for the same project at a future date.

§110-13X-7. Uses of credit; transferability.

7.1. The tax credit may be applied to reduce taxes imposed by articles twenty-three (business franchise tax), twenty-four (corporate net income tax) and twenty-one (personal income tax) of Chapter 11 of the West Virginia Code in the tax year the investment is placed in service after approval of the project by the Film Office (with potential carry forward for an additional 2 years). The credit may be taken into account in computing estimated payments.

~~7.2. In the event of a transfer or sale of unused credit, the duty of compliance with all applicable statutes and rules relating to application and use of the credit, including any liability for recomputation or recapture of the credit, first falls on the seller or transferor, rather than the presumed innocent buyer, or credit transferee. However, both the seller and the buyer are jointly and severally liable for any statutory violations relating to entitlement, use and application of the credit and any recomputation or recapture thereof.~~

~~7.3.~~ 7.2. After approval by the Film Office of any transfer, sale or assignment of the tax credit, pursuant to W. Va. Code §11-13X-8, the transferee shall acquire the amount of credit that remains available under that section. The transferor and the transferee or transferees may apply the credit against tax in the year of the transfer, and succeeding years in accordance with the amount of credit to which each is entitled, but the dollar amount of credit available to each shall not be exceeded or duplicated.

§110-13X-8. Confidentiality.

8.1. All information submitted to the Tax Commissioner and the Film Office is confidential and not subject to public disclosure when filed with the Film Office or Tax Commissioner except as otherwise provided in this rule or the West Virginia Code.

8.2. All information submitted to the Film Office pursuant to an eligibility application for

designation as an eligible company and documents related to the application, is confidential and not subject to public disclosure, except the following in accordance with W. Va. Code §11-13X-11:

8.2.a. The full legal name of the applicant;

8.2.b. The mailing and office addresses and telephone number of the applicant; and

8.2.c. The name of a person to contact for the applicant.

8.3. All records and documentation relating to application, evaluation or qualification of a company or a project for the tax credit authorized under W. Va. Code §11-13X-1, *et seq.* is tax information subject to the confidentiality restrictions of the West Virginia Tax Procedure and Administration Act, W. Va. Code §11-10-1, *et seq.*, including, but not limited to, the provisions of W. Va. Code §11-10-5d.

8.4. The Tax Commissioner determines the Film Office to be a "person having a material interest" in the information in accordance with the provisions of W. Va. Code §11-10-5d(f).

8.5. The confidential information, relating to application, evaluation or qualification of a company or a project, including general correspondence to or from the Film Office, or to or from the West Virginia Tax Department, including information generated internally by the Film Office or Tax Department, including but not limited to, internal memoranda and reports, is confidential and not subject to public disclosure, unless otherwise provided by statute or rule.

8.6. All tax returns and tax return information subject to the non-disclosure restrictions of W. Va. Code § 11-10-5d are confidential, except for the information subject to disclosures authorized, mandated or permitted pursuant to the West Virginia Tax Procedure and Administration Act, or W. Va. Code §11-10-5s or W. Va. Code §11-13X-1, *et seq.*

§11-13X-9. General Procedure and Administration.

9.1. Requirements to Claim the Tax Credit. – To claim a tax credit, the eligible company shall comply with W. Va. Code §§11-13X-1, *et seq.* and this rule and shall timely provide complete and accurate forms, returns, schedules and other information required by the Tax Commissioner or Film Office.

9.2. Applicability of Various Tax Laws. – Application of this credit and eligibility for this credit shall not abrogate application of the provisions of W. Va. Code §§ 11-23-1, *et seq.* (Business Franchise Tax), W. Va. Code §§ 11-24-1, *et seq.* (Corporation Net Income Tax) and W. Va. Code §§ 11-21-1, *et seq.* (Personal Income Tax), and rules issued pursuant to those statutes, with respect to any eligible taxpayer or owner of any eligible taxpayer to the extent that they may be subject to the provisions of those laws, and shall not abrogate application of the provisions of W. Va. Code §§ 11-10-1, *et seq.* (Procedure and Administration) which provides for administration of those taxes.

9.3. Maintenance of Records. - An eligible company shall maintain the records required to verify the validity of its eligibility for the tax credit and the accuracy of the amount of the tax credit claimed. Failure to do so may result in denial of the tax credit.